STATE OF MICHIGAN

COURT OF APPEALS

NORMAN MALBURG and LORRAINE MALBURG,

Plaintiffs-Appellants,

v

WAYNE J. LENNARD & SONS, INC., KIM J. LENNARD and PAUL NEUMANN,

Defendants/Cross Defendants-Appellees,

and

JO ANN GERWECK and GERWECK REAL ESTATE COMPANY,

Defendants/Cross Plaintiffs-Appellees,

and

ANNETTE E. NEUMANN,

Defendant-Appellee.

UNPUBLISHED
August 28, 2003

No. 236980
Monroe Circuit Court
LC No. 97-006678-CK

NORMAN MALBURG and LORRAINE MALBURG,

Plaintiffs-Appellants,

v

PAUL M. NEUMANN and ANNETTE E. NEUMANN,

Defendants-Appellees.

No. 236981
Monroe Circuit Court
LC No. 99-009517-CH

Before: Markey, P.J., and Cavanagh and Hoekstra, JJ.

MARKEY, J. (concurring in part and dissenting in part)

I respectfully dissent from the majority's opinion in docket number 236980. The majority affirms the trial court's grant of summary disposition in favor of the Lennards and the Neumanns in respect to plaintiff's claims for breach of a real estate sales agreement and for promissory estoppel. I would reverse on these issues.

The majority correctly cites the standard of review we must apply to a trial court's grant or denial of summary disposition. Under MCR 2.116(C)(10), summary disposition is proper only when "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." I turn first to the analysis of whether there existed a valid contract for sale of the property at issue. Again, the majority correctly sets forth the issue and the pertinent law. I differ, however, with their application of the facts of the instant case to the appropriate law. In my opinion, it is patent that the parties had indeed formed a contract for the sale of land. The majority concludes that there was no contract for the sale of the property at issue and that the parties only had a series of offers and counteroffers.

As the majority states, the substance of a contract for sale of land is governed by general contract law principles: "[T]here must be a meeting of minds regarding the 'essential particulars' of the transaction." *Zurcher v Herveat*, 238 Mich App 267, 279; 605 NW2d 329 (1999). These material provisions are the identification of (1) the property, (2) the parties to the sale, and (3) the consideration. *Id*. at 290-291. It is at this point that I disagree with how the majority applies the facts in this case to the law. The majority states that in order for there to be a "meeting of the minds," there must be no variation between the acceptance and the offer. The majority in essence concludes that if there is even a slight deviation from the precise offer made, then there is no meeting of the minds and hence no contract formed. I do not believe this to be either an accurate reflection of the law nor a proper application of the facts to the law.

As previously indicated, a contract for the sale of land is formed when the parties have identified in writing the property, the parties, and the consideration. Here, there is simply no question but that that occurred. Specifically, there is no dispute as to the property involved: approximately 952 acres on North Custer Rd., Raisinville, Monroe County, Michigan. Neither are the parties disputed: Norman and Lorraine Malburg intended to purchase the property from Wayne J. Lennard & Sons, Inc; thus, the parties are identified. Last, there was an agreement as to the consideration plaintiffs would pay for this property: the sales price was $2,550,000. These terms were set forth clearly in the January 22, 1997, memorandum prepared on behalf of the Malburgs: it confirmed the consideration, parties and property. Moreover, Norman and Lorraine Malburg and their attorney, Wayne Stewart, all signed the letter-memorandum. Plaintiffs' undated exhibit six is also a memorandum on sale of real estate prepared and signed by Kim J. Lennard as Vice President of Wayne J. Lennard & Sons Inc. That memorandum is the reciprocal agreement also setting forth the material provisions constituting the substance of the contract for sale of the property at issue. In it, Kim Lennard agrees that the purchase price for the relevant

property is as stated - $2,550,000. He too identifies the same property as the Malburgs, and it is apparent that the Lennards are the sellers and the buyers are the Malburgs. These constitute the material provisions requisite to the formation of a contract for the sale of real property.

Undeniably, there were various other elements of the contract of sale to be finalized between the parties; however, the material provisions required by law to form a contract, were without question, agreed upon. The fact that other issues remained to be negotiated does not, in my opinion, fail to create a genuine issue of a material fact in respect to whether the material provisions of a contract for the sale of land were agreed upon. The majority clearly err when they require the "unconditional" acceptance of several items in plaintiff's offer in order for there to be a valid "meeting of the minds" on the material provisions of the contract. Consequently, I believe that the trial court erred when it granted defendant's summary disposition on the contractual issue. I believe that substantial evidence existed of a genuine issue of material fact.

Similarly, I believe that the trial court erred in granting defendant summary disposition of the promissory estoppel claim against the Lennards. Again, as the majority correctly reiterates, the elements for a claim of a promissory estoppel are: (1) a promise; (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, (3) which in fact produced reliance or forbearance of that nature; and (4) in circumstances such that the promise must be enforced if injustice is to be avoided. My review of the pertinent documents, deposition transcripts, memoranda, and briefs surrounding the long negotiations and gyrations between these two parties for the sale of this property obviously reflect that a promise was made. A promise is "a manifestation of intention to act or refrain from acting in a specified manner, made in a way that would justify a promisee in understanding that a commitment had been made." *Schmidt v Bretzlaff*, 208 Mich App 376, 379; 528 NW2d 760 (1995). The promise was, of course, to sell the Malburgs the 952 acres in question. The majority concludes that Lennards made no definite and clear promise to sell the property to plaintiffs. In my view, however, the evidence is more than sufficient to preclude the grant of summary disposition on this element. Neither this Court not the trial court may decide these issues of fact. *Nesbitt v American Community Mutual Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999). As I discussed in respect to the contract claim, I believe that the material provisions of the contract for the sale of the property were established. The Malburgs and the Lennards had a number of details, admittedly important ones, to negotiate but it is apparent from reading all of the materials – including the depositions – that those details would most likely have been agreed upon eventually and that the Malburgs patently believed that from the written document, actions, and continued interaction and negotiations with the Lennards on other matters that they had an agreement to purchase the property. Indeed, the Malburgs were vigorously attempting to sell their home because they needed to in order to purchase the property. They had raised and agreed to the Lennard's asking price, had increased the amount they were willing to place as a down payment, and had already deposited an additional $45,000 into their real estate agent, Gerweck's, client account. No evidence exists to counter the reasonable belief that the Malburgs had that they were, in fact, purchasing the property. The Lennards actively pursued their agreement with the Malburgs, and only at the very last minute did they pull the rug out from under the sale. So, I firmly believe that a genuine issue of material fact existed as to whether a promise was made so that summary disposition was improper on this element.

In respect to whether the second element was satisfied sufficiently to defeat a motion for summary disposition – that the promissor should reasonably have expected to induce action of a definite and substantial character on the part of a promissee –I again conclude that it was. The Malburgs, as previously explained, acted in good faith at all times in pursuing what they believed needed to be done to close the sale. They were selling their home; they were raising the money they needed; they were actively corresponding with their real estate agent; they had begun having the paperwork prepared for the closing - including the title work-; and they had no indication whatsoever that the Lennards would or were considering reneging on the deal. The Malburgs conduct was substantial and reasonable and stemmed from their reliance on the Lennard's promises.

All of these actions are also pertinent to the third element of promissory estoppel: that the promise produced reliance or forbearance. Certainly, the Malburgs were relying on their belief that a promise existed to sell them the property. And, obviously, an injustice now exists because the Lennards' did not sell them the property.

It appears to me that the majority forgets that this was a motion for summary disposition. The standard of review must be one that gives all of the benefit of the doubt to the plaintiffs here: The evidence submitted on a motion for summary disposition must be viewed in the light most favorable to the nonmoving party, *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999), and this Court will liberally find genuine issues of material fact, *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995). From my review and analysis of the evidence and the law, there clearly was sufficient evidence to forestall defendant's motion for summary disposition on plaintiffs' claim of promissory estoppel.

In short, I conclude the majority correctly cites all of the pertinent law but then mistakenly applies the law to ancillary matters as if these details were the "essential particulars" of the purchase agreement. In my opinion, the basic contractual requirements for the creation of contract were satisfied as were the elements of promissory estoppel sufficiently to prevent the granting of the motions for summary disposition on behalf of the Lennards on those two claims.

I agree with the majority's analysis as to plaintiffs' third claim, for tortuous interference with the contract, and the fourth claim, for civil conspiracy.

/s/ Jane E. Markey